

THE NEW-YORK CITY-HALL RECORDER.

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NO. 1.

AT a COURT of GENERAL SESSIONS of the Peace, holden in and for the City and County of New-York, at the City-Hall of the said City, on *Monday*, the 4th day of *January*, in the year of our Lord one thousand eight hundred and nineteen—

PRESENT,

The Honourable

CADWALLADER D. COLDEN,

Mayor.

ANTHONY L. UNDERHILL,

and

REUBEN MUNSON,

Aldermen.

P. C. VAN WYCK, *Dist. Attorney.*

JOHN W. WYMAN, *Clerk.*

(CONSPIRACY TO DEFRAUD.)

EDWARD ROBBINS AND JOHN
SHEFFIELD'S CASE.

VAN WYCK, D. B. OGDEN, PRICE, and J. A.

HAMILTON, *Counsel for the prosecution.*

EMMET AND ANTHON, *Counsel for the de-
fendant.*

C. was indebted to R. in a large amount, who agreed that if C. would deliver him certain checks of D. to a specific amount, he, R., would simultaneously deliver to C. the check of R. to a specific amount. At the time appointed, the agent of C. presented to S., a clerk of R., the checks of D. agreed to be delivered, when S. held out the check he was to deliver, pursuant to agreement; whereupon the agent, believing that S. was about to deliver the check, delivered those of D. to S. who suddenly retreated and withheld the check of his principal, and retained those delivered to him by force. It was held, that should the jury believe from the facts and circumstances in the case, that R. and S. conspired to obtain those checks, contrary to such agreement, it was immaterial for the purposes of an indictment for a conspiracy, whether, at the time the checks were so obtained, they had been paid by D. to C. or not. Also, that it was immaterial whether, at that time, C. was indebted to R. to a greater or less amount than such checks; and it was also held, that if S., in such transaction, acted by the direction

of R., as his clerk, he was not the less excusable by reason of standing in that relation.

During the last term the defendants were indicted for a conspiracy to cheat and defraud Augustus F. Cammann of certain orders for the payment of money, commonly called bank checks. The indictment, in the first count, alleged, that the defendants, on the 23d of November last, for the purpose of obtaining from Cammann a large number of orders, commonly called bank checks, amounting in value to \$4800, conspired to cheat and defraud him of the said checks; and, in the second count, that they conspired to obtain from Cammann, and in pursuance of their conspiracy, did obtain from him, a large number of checks, signed by B. & J. Cooper, to the amount of \$4800. The indictment sets out the particulars of the conspiracy, and the manner in which it was carried into effect.

Van Wyck opened the case to the jury.

Augustus F. Cammann, the prosecutor, on being sworn, testified in substance, that about a year ago, being a broker, the firm of B. & J. Cooper was indebted to him in a considerable sum of money, which he found a difficulty in collecting. The witness was indebted to Robbins, one of the defendants, who held his check for \$17000. Robbins knew of the pecuniary transactions which the witness had with the Coopers, and offered to assist him in the collection of the money due by them, for which he held their checks to a considerable amount.* At one time, previous to the transactions hereafter to be detailed, Robbins pro-

* It is to be understood, that the checks of B. & J. Cooper, held by Cammann, and those of Cammann, held by Robbins, were not intended by the drawers to be presented to, or to draw funds from, the banks, but were given and received as acknowledgments of so much money received by the drawers, and as security for its repayment. This is a common practice with moneyed men, and saves the trouble and necessity of keeping accounts. But these checks, if presented by any one, would, of course, have been paid if the makers had funds in the bank.

posed to the witness to turn out all the checks of the Coopers in his hands, in payment of the demand which Robbins had against the witness, who refused, on the ground that other creditors had equal claims on him. However, the witness entered into a negotiation with Robbins to deliver to him a *certain portion* of those checks, for which he agreed to advance part in cash, and carry the remainder to the credit of Cammann.

On the 17th of November, the witness delivered to Robbins a check of the Coopers for \$1250, thereby paying two promissory notes, in favour of Robbins, against the witness, to the amount of \$829, leaving a balance of \$421 for which he received Robbins' check.

On the 21st of November, the witness and Robbins entered into another agreement by which he (Robbins) was to receive the Coopers' checks to the amount of \$3850, for which he was to pay on the Monday following \$1420, and carry \$2430 to the credit of Cammann.

On Monday, the 23d of November, the witness called on Robbins for the \$1400, who paid \$100 and promised to pay \$1000 on Wednesday, the 25th of November.

On that day the witness called on Robbins, who said that he wanted more of the Coopers' checks, and inquired of the witness whether he could furnish them, who replied that he had one parcel of checks of that firm, to the amount of \$4300, which he could deliver Robbins, who then asked the witness if he had them with him, and being answered in the negative, Robbins said he wanted to purchase them, and he offered to advance the witness, on their delivery, \$2000, and to pay the \$1000 due on the former contract, and carry the balance to the credit of Cammann, who told him that he had better settle the \$1000 already due, but, nevertheless, finally assented to the offer. It was understood, at the same time, between the witness and Robbins, that all the checks of the Coopers which already were, or might be, procured by the witness should be delivered upon similar terms, but the proportion of cash which he was to receive on their delivery was not settled; and the agreement relative to the delivery of those checks, to the

amount of \$4300, and the reception of \$3000 by the witness, was a specific agreement growing out of that general arrangement. Robbins requested the witness to call at a quarter after two o'clock, and he should receive the money. He was solicitous, however, that Robbins should advance the \$1000 on the old contract, who declined so to do; and while they were discoursing, Sheffield, the other defendant, entered the office. Robbins told him to go to Messrs. Boggs & Thompson's, and get \$2000. Sheffield asked him if he should take a check; to which Robbins made no other reply than "Go." After Sheffield had gone, Robbins told the witness that if Sheffield could get \$2000, he, Robbins, could let the witness have the \$3000 by a quarter past two o'clock.

While Sheffield was absent, the witness and Robbins conversed concerning the enormous interest which he was in the habit of charging to the witness for money. In the first place, in their pecuniary dealings, Robbins commenced by charging after the rate of \$1 a day for \$1000; from that he advanced, progressively, until he arrived at \$7 a day for the interest on the same amount; and the witness was in the habit of paying or settling the interest by notes or checks every five days on the whole \$17000!

When Sheffield returned, Robbins asked him if he had the money; to which no answer was made; but Sheffield and Robbins appeared to count \$2000 in \$100 bills, so that the witness heard them, but he could not, from their position, see the bills. The latter said that he had \$2000, and that the witness should have \$3000 at a quarter after two, and that Sheffield would be there to pay it, if he, Robbins, was not at home. The witness objected to the transaction of the business by Sheffield, on the ground that the moneyed dealings between himself and Robbins had been confidential; but he replied that Sheffield knew nothing of those dealings. Robbins then said to Sheffield, "I am going to give you \$3000 to pay Mr. Cammann, at a quarter after two, and he will give you Coopers' checks for \$4300."

At the time appointed, the witness went to Robbins' office, and found Sheffield there who seated himself at the desk.

he rose and said, "Have you the checks?" "Yes: have you the money?" rejoined the witness. "Yes," said Sheffield, "Mr. Robbins has directed me to settle with you," and, opening his hand, the witness saw through the back of the paper, by means of the light which shone upon it as Sheffield read it, that it was a check on the Branch Bank. The witness asked Sheffield if he would pay him. Sheffield said he had a check, and wished to know if the witness had the checks of the Coopers. The witness then took out the checks and held them in his hands, when Sheffield wanted him to lay them down: but the witness refused, alleging that Robbins had then \$1000 in his hands of the witness' money, on the old contract; and that although he was willing to settle, he would not give up the checks until he received the \$3000. Sheffield said that he knew nothing of that contract; and after the witness had remonstrated with Sheffield, he told the witness that he had better wait until Robbins returned.

On the 26th, the witness sent his boy to Robbins for the \$1000: the boy returned not having seen him.

On the 27th, and on the following day, the witness employed his attorney, Charles W. Sandford, Esquire, to conclude the exchange. Having received the instructions of the witness, he went to Robbins with the checks of the Coopers, but returned with the checks, not having seen Robbins; and the witness, on the following day, instructed Sandford, that if Sheffield manifested an appearance of fairness in the transaction, to lay down the checks of the Coopers. The witness explained to Mr. Sandford, very particularly, the agreement between himself and Robbins, and expressed to him his fears, from what had passed, that Robbins did not intend to fulfil it honestly. Sandford went to the office of Robbins, and returned without the checks or the money.

From the cross-examination of the witness, conducted by Anthon, it appeared that the first dealings between the witness and Robbins commenced in May last, and that a settlement took place between them in October, when the witness owed him \$17,000 for borrowed money. Three different checks, on the Branch

Bank, the first dated on the 29th of September, 1813, for \$7000 payable on the 4th of October, the second dated October 2d, for \$4000, payable on the 7th of October, and the other for \$6000, dated on the first, and payable on the 6th of October, were produced on behalf of the defendants, when the witness stated that these checks constituted the amount due by him to Robbins; that these checks were renewed every four or five days, and the interest thereon, according to the rate before mentioned, was always paid down on the renewal. The witness, hereupon, produced a memorandum in figures, in the handwriting of Robbins, showing the receipt of the enormous usury charged by him as aforesaid.

The witness never agreed to turn out all the checks of the Coopers to Robbins in payment of the \$17,000; nor did the witness ever agree to turn out those checks to the amount of \$15,000; nor did Robbins ever tell the witness, either when they were alone, or in presence of a Mr. Stollenwerck, that he, Robbins, would not lend the witness any more money unless he brought the checks of the Coopers.

It further appeared from the testimony of this witness, that he had been in the habit of loaning money at a usurious rate to individuals, and that this same \$17,000, or a part of it, was so loaned. The general rate of interest among the brokers in Wall-street is \$2 a day for the use of \$1000. There are some who are very moderate who take a dollar and a quarter a day for a thousand, and some who loan for a dollar a day for a thousand; but these are below the customary premiums. The highest rate of interest the witness had ever received was ten shillings for the use of \$500 for a day. The witness accounted for the seeming inconsistency of his loaning money at a less interest than he gave for it by saying, that he loaned to persons who were largely indebted to him, and whose credit he thought himself, from interest, obliged to support.

Charles W. Sandford, sworn, testified in effect as follows:

On the 27th of November Cammann called at my office, and requested me to go down to the office of Robbins and take

the checks of the Coopers for \$4800, and receive from him \$3000. I asked him why he did not go himself, and he replied that Robbins and himself had some differences or dispute; and he then explained to me the nature of the agreement between them relative to the checks which had been and were still to be delivered, and of their amount.

Having received from Vermilye the clerk of Cammann, a bundle which he said contained checks of B. & J. Cooper to the amount of \$4800, I went to the counting-room of Robbins, and found Sheffield there, who said that Robbins was not in, but that he, Sheffield, had instructions on the business. I then asked him whether he was prepared to pay \$3000 and receive the checks of the Coopers. He said that he was, and opened a check for \$3000, drawn by Robbins on the Branch Bank, and showed it to me; after which, he folded up the check and put it into his pocket, and held out his hand as if to receive the checks I was to deliver. I then said to him, "Am I then to understand that this is to be the mode of payment?" He replied that it was, and said, that he was to pay me in *the* check; laying emphasis on the word *the*. I said to him, "By *the* check you mean that of \$3000 which you now hold." He replied, "Yes; I mean *the* check of \$3000." I then remarked that he might as well have answered yes or no. He then said, "You seem to be so suspicious of me, you had better call and see Mr. Robbins. I told him I was thus particular because I was desirous of preventing any misunderstanding; and in a further conversation I said to him, 'We are then to understand that you are to give me the check of Mr. Robbins, which you showed me, for \$3000, on my giving you the checks of the Coopers for \$4800? If that is your intention I am ready to deliver them.'" He replied, "Yes, I was instructed to give you this check on receiving those of the Coopers: but since you are so suspicious, you had better call and see Mr. Robbins." Sheffield then walked from the desk to the fireplace, and after some repetition of the conversation, Sheffield again showed me the check of Robbins which he had before exhibited, on the Branch Bank, for \$3000,

and said "You need not have been so suspicious. This is the check which I was to have given you if you had delivered the checks of the Coopers." Whereupon I said, it is not yet too late. I am now willing to give the checks of the Coopers on receiving that check; but Sheffield said, No, the matter must be now settled with Mr. Robbins. I then returned to Cammann, redelivered the checks, and related our conversation.

The next day, (November 26,) I received instructions from Cammann that if Robbins or Sheffield should promise unequivocally to pay the \$3000, either in cash or Robbins' check, that I should deliver the checks. That it might be ascertained whether I should see Mr. Robbins if I went to his counting-house, Mr. Cammann sent his boy to know if Robbins was there. The boy came back and said Mr. Robbins was in his counting-room. I then went immediately to the counting-room of Robbins and found Sheffield. I inquired for Robbins, and was informed that he was absent, and was not soon expected, but that he, Sheffield, had received further instructions from Robbins, and was ready to settle the transaction. Having the checks, as before, I inquired of Sheffield whether he was ready to pay me the \$3000: whereupon he showed me the same check of Robbins for \$3000 that he did the preceding day, and inquired of me, with much particularity, whether I came as the agent of Cammann or on my own account. My reply was that I came to deliver Coopers' checks to the amount of \$4800 and receive \$3000 in pursuance of the agreement between Cammann and Robbins. Sheffield said he was ready and willing to do so; but that he was instructed to get a positive answer whether I came as the agent of Cammann or not. I replied that if he was ready to pay me \$3000, I was ready to deliver him the checks of the Coopers as the agent of Cammann. Sheffield then placed himself at the desk, and requested me to give him the checks that he might make a memorandum of them. I then showed him the checks singly, and he made a memorandum, adding up the amount which was \$4800. During this time, he held the check for \$3000 in his

hand, and after he had made the memorandum he turned round holding out that check towards me in his right hand as if to deliver it, and holding out his left hand as if to receive those of the Coopers. We stood opposite to each other, he holding out his hands and I mine; when, thinking there could be no doubt but that he would deliver the check he held, I delivered the checks, when he immediately withdrew both hands, retreated backwards, and sat down. I immediately followed, demanding the check; but he said, "No: I will not give you Robbins's check, but I will give you Cammann's check for \$6000!" I told him I had no instructions to receive such check, and demanded that for \$3000, which he refused to deliver. I then endeavoured to wrest from his hands the checks I had delivered, but he placed both of his hands containing the checks between his thighs, as if determined to retain them by force; when, after a short struggle, fearing that I should tear them, I desisted, and again demanding the checks, or the \$3000, endeavoured to persuade him to deliver them, but to no purpose. After securing the Coopers' checks, he returned to the front of the platform of the desk, holding in one hand a check, which I then thought to be the check of \$3000, which I immediately took hold of, and he, endeavouring to retain it, it was torn; when he said, "You have torn Cammann's check for \$6000." But I was unable to ascertain whether it was Cammann's check or not. I then told him the consequence of his conduct, against which I remonstrated with some severity, using both threats and persuasion; and in the course of my remarks observed, that the act of which he had been guilty was equal to a felony; to which he replied, "Let the worst come to the worst, it is only your oath against mine!" I left him without being able to obtain the checks.

Anthon, in his opening to the jury, stated three principal grounds of defence:

1. That Cammann had contracted with Robbins to deliver *all* the checks of the Coopers to him, as payment towards the \$17000, but having failed to fulfil the contract the check of \$3000 was withheld, as had been represented.

2. Sheffield, in this transaction, acted under the express direction of Robbins, as his servant, and this relation precludes the idea of a conspiracy.

3. Cammann, the principal witness for the prosecution, is not entitled to credit.

Lewis A. Stollenwerck, a witness for the defendants, testified, that on the 23d of November last, he went to the store of Robbins, who was there doing some business with Cammann, who appeared to be sealing a package. Very little conversation passed between them; but Robbins was drawing a check for \$400, for Cammann, who, as the witness thought, after observing that it was right, said that he ought to have more; to which Robbins replied, that it was all he had. He also told Cammann to bring him those papers or checks, who answered that he would, and then went away. The witness has, at other times, before this, frequently heard Robbins urge Cammann to bring him papers.

Joseph Cooper, on the same side, testified, that he had had large dealings with Cammann, and, as far as those dealings extended, there was no man in the community whose moral character stood higher than his, in the estimation of the witness, until the month of October last. He has heard nothing against Cammann's character, except that which relates to this transaction with Robbins.

Anthon hereupon produced a number of checks, which the witness stated to be those of the firm of which he was a partner, and that they were paid and overpaid in the notes and drafts of the firm given to Cammann for discount. The witness had often tried to effect a settlement with Cammann, but was unable.

Hamilton proceeded to cross-examine this witness with a view of ascertaining *in what mode* those checks had been paid; and the court not perceiving the relevancy of the testimony, Ogden stated that the opposite counsel intended to urge to the court, that as these checks were paid before they were obtained, in the mode stated in the indictment, that this was no offence because they were of no value.

Emmet apprized the court, that the defendants would rely on this variance between the indictment and the proof:

in the indictment these checks are averred to be of the value of \$4800. This was a necessary averment, with which the proof should correspond.

The Mayor said, that so far as regarded the case now under consideration, it might be a sufficient definition of a conspiracy to say, it was a confederacy or agreement of two or more to do any wrongful, immoral, or unlawful act to the prejudice of a third person. If this were a just definition of the offence, it was certainly immaterial whether the Coopers' checks were paid or not. For whether they were or were not, it would not be more or less wrongful, immoral, or unlawful to get them out of the hands of Cammann, without his consent, or even by violence; and though they may have been paid, yet they may have been vouchers in his hands, the loss of which might have been extremely prejudicial to him. It appeared, indeed, from the evidence already given, that these checks were the only evidences he held against the demands and checks which the Coopers had on him. As to a variance with the indictment, it could not be seriously contended that the value, by the proof, must correspond with the indictment. This was not required in any case, but where the nature of the offence depended on the value or amount. In larceny, the value was of no consequence, further than to ascertain whether the crime was petit or grand larceny. It had, it was true, been said that an indictment for obtaining from a man, by false pretences, his own promissory note before it was issued, could not be supported. This was not because a man's own note could not be said to be of any value, but because it could not be said to be his goods, chattels, or effects, within the meaning of the statute. But could not an indictment at common law for a conspiracy, fraudulently to obtain from a man his own note, be maintained? In this case, however, the checks of the Coopers are not laid to have been of any certain value; they are said to have been of large "value in amount," and the amount is then mentioned under a *vide licet*. It may be observed, too, that the defendant Robbins has admitted that the checks of the Coopers were of some va-

lue; else why did he take large amounts of them in extinguishment of the debt due to him from the prosecutor, and even make further advances upon their security? It is the opinion of the Court, said the Mayor, that further inquiry into the accounts between the Coopers and Cammann, to ascertain whether Cammann could claim any thing from them on these checks, would be irrelevant, and must be excluded.

The witness, Cooper, further stated, that he would not give the court to understand that *all* the checks of the firm in possession of Cammann had been paid previous to the last week; but all that were produced to the witness were paid before last July.

By the Mayor: Then, as I understand, these checks were not otherwise paid than in accounts between your firm and Cammann, which still remain unliquidated?

The witness answered, that no settlement had taken place.

John Sanford sworn: I have known Cammann three years, and know nothing good of his character. I have heard some speak good and some bad of him; the balance is against him. I would not believe him under oath.

Daniel Haviland sworn: I have known Cammann six years; and, as far as I have heard, his character is bad. I would neither believe his word nor his oath.

John Jerolleman sworn: I have known Cammann six years: he lived at Brooklyn, where his character stands very ill. I don't think that I would believe him on oath.

Teunis Jerolleman sworn: I am sometimes a justice of the peace at Brooklyn. I have known Cammann six years. The general complaint against him was, that he was a bad man and a take-in. I cannot say that I would not believe him on oath.

Michael Paff sworn: I have known Cammann twelve or fifteen years. I don't know, nor have I heard much about him. There has been a dispute between us.

Hendrick L. Suydam sworn: I know nothing about him.

Simon Myers sworn: I have known Cammann three years; but never heard any thing good about him. I would not

trust him for five dollars, nor believe him on his oath. I don't remember whether I was a witness on the trial of Lazarus, in this court, (1 vol. City Hall Recorder, p. 89.) and took an active part in his favour; but I remember that I lost \$2000 by endorsing for Cammann.

John G. Coster sworn: I have known Cammann twenty years. He is not a man of veracity; but whether he is to be believed on oath I can't say.

Grove Wright sworn: I have known Cammann for a number of years; but can't say what is his character.

Ralph Patchen sworn: I have known Cammann six years. I know little of his character; but have heard several talk light of him.

James Boggs, president of the Phenix Bank, sworn: I believe the character of Robbins perfectly good. I have known Sheffield one or two years, and his deportment is good. On the 23d of November he obtained for Robbins, from the proceeds of sales, Boggs & Thompson's check for \$2000.

Charles Denston sworn: I have known Robbins for two years: his character is good.

Joseph D. Fay sworn: I have known Cammann five or six years, and have heard rumours against him; but as far as public report has gone it was rather in his favour.

Luke Stansbury sworn: I have known Robbins eight or ten years. His character is very good.

John Roe sworn, concurred with Stansbury.

John Hewitt, on being sworn, stated, that the general character of Cammann was bad; but admitted that a short time since, he had been in the habit of loaning the witness money without interest, and that he had recently written to Cammann a letter, which was produced, relative to some pecuniary concern, commencing with, "My dear friend."

The defendants having rested, the prosecution produced Sylvanus Miller, Dr. Hosack, Thomas L. Ogden, and Elias Hicks, who all concurred in testifying that the character of Cammann was good, and that he was entitled to full credit under oath. He was represented as one who had been unfortunate in business,

but that he was a man so credulous and unsuspecting, that he was more likely to be imposed on than to defraud others.

Hervey Young, sworn on the same side, testified, that he knew Robbins and Sheffield, *the former* of which, the witness had always heard, was a man not to be relied on; *the latter* he would not believe under oath. Robbins had sold the witness seals of a spurious metal for gold.

Charles Irish sworn: From what I have heard, Robbins is a pretty slippery kind of man: I would not believe Sheffield under oath.

Jordan Mott sworn: I have heard of the character of Robbins, and was always unwilling to have any thing to do with him.

Isaac Marquand sworn: From general report the character of Robbins is not very good; he is considered as an unfair dealer. I purchased once some seals of him, and told him at the time that I did not like him; but I got the goods twenty-five per cent. lower than I could have purchased them elsewhere.

Charles Osborn sworn: Robbins is not upright in his dealings: he sold me plated for gold seals.

Rufus D. Nevins sworn: From general report I did not receive a very favourable impression of the character of Robbins.

Peter V. Ledyard sworn: The character of Robbins does not stand very high: he is a dangerous man to purchase from.

In justice to Robbins we think proper to state, that the principal part of the witnesses sworn against his general character were persons who, from their cross-examination, appeared to have been engaged with him or Sheffield in a controversy contested in the Mayor's Court, relative to a quantity of seals: the charge against Robbins, in substance, appeared to be of this nature: he sold to several of those witnesses a quantity of seals for gold, which, in truth, were either plated, or of a different metal. Having done this, he furnished Sheffield with money to purchase of those persons the same seals, and procure their warranty of the goods for gold; and on the several warranties caused suits to be instituted by Sheffield against them. It is a fact, that several

suits of this kind were heretofore tried in that court; but, on this trial, this charge against Robbins was denied by his counsel; and, indeed, it was impossible to ascertain, from the different statements of counsel, where the truth of the affair was.

James Alport sworn for the defendants: I am an Englishman—a merchant. I have known Robbins and his family ten or twelve years; I never heard any thing against him until the controversy about the jewellery.

Frederick Swan sworn: I have known Sheffield since he was a child. He is now twenty-two years old. His character has been good. I have not known him in two years past.

Sanford Langworthy sworn, concurred with the last witness.

Samuel Judd sworn: I have known Robbins and dealt with him two years, and never heard any thing against him.

Here the evidence on both sides closed.

Anthon and Emmet summed up the case, and in their address to the court and jury principally contended, that this was an attempt, on behalf of the prosecution, to have the defendants punished *criminally* for an act which could only be legally redressed in a *civil tribunal* against Robbins; and the only reason why the present remedy had been resorted to, was, that this defendant might be deprived of the testimony of Sheffield. Cammann owed Robbins \$17,000, who made a strong effort to obtain his own money, which Cammann, who was an acknowledged insolvent, was otherwise unable to pay. He had failed to fulfil his contract, his testimony was vitally impeached, and he ought to be turned over to his civil remedy.

There is no positive testimony of a conspiracy between Robbins and Sheffield; and although it may be urged that the jury may infer a conspiracy from the circumstances, yet, as Sheffield was the clerk of Robbins, it is to be presumed that he acted rather in pursuance of the *commands* of his principal than of a corrupt agreement. Should the jury believe that Sheffield did act in pursuance of the instructions of his principal, they did not *conspire* together, and this prosecution is at an end.

The last-mentioned counsel strenuously insisted to the court, that in an indictment for this offence the averment of the *value* of these checks was material, especially for the object of enabling the court to apportion the punishment. This indictment having stated the *value* of the checks to be \$4800, and it having appeared, in the progress of the trial, that these checks had been paid before they came into the possession of Sheffield, they were worth nothing; and, therefore, there is a fatal variance between the proof and the indictment.

The counsel, in support of their argument, cited to the court the case of *The King vs. Turner and others*, (13th of East's Reports, p. 228,) showing that an indictment for a conspiracy would not lie for agreeing to enter the warren of the prosecutor by night, for the purpose of snaring and destroying his hares, as this was but a trespass; and Mr. Anthon mentioned to the court the case of *Cromwell and Field*, tried in this court, (3d vol. City Hall Recorder, p. 34.)

Mr. Hamilton summed up the case on behalf of the prosecution, and was followed by Mr. Ogden.

By the Mayor: Gentlemen of the jury, I shall be as brief in my remarks as possible. The testimony in this cause has been long, and the facts are complicated. The defendants are charged, in two separate counts in this indictment with a conspiracy: in the first, for having conspired together, with an intent to injure and oppress Augustus F. Cammann, by getting into their possession certain checks, or orders for the payment of money, belonging to him, and the second count is in the same form, but alleges further, that they carried their intent into execution. Now, it is competent for the jury to find the defendants guilty on either of these counts, and acquit them on the other; for it is not essential in a prosecution for this offence that the jury should find, that the act, which the defendants conspired to perform, should be carried into effect.

Should the jury, therefore, believe, from the facts in this case, that the defendants conspired together to obtain possession of these checks from Cammann, without or against his consent, and contrary to his agreement with Robbins, that

object of the conspiracy is sufficient to render the defendants criminally responsible.

And here it is wholly immaterial, for the purposes of this indictment, whether, at the time these checks were obtained, Cammann was indebted to Robbins or not; and, in the opinion of the court, this consideration should be excluded by the jury. But if it be granted that Cammann was indebted to Robbins ever so largely, yet that debt could give Robbins no claim to these checks of the Coopers, no more than it could give him a claim to any other property which Cammann might have had in his possession. Robbins might as well, in virtue of Cammann's being his debtor, have claimed a right to take, without his consent, or by violence, Cammann's furniture, or any thing else, in satisfaction of the debt. Robbins had no pretensions to the Coopers' checks beyond what the agreement between him and Cammann gave him; and even that agreement the defendants were not justifiable in enforcing, or in confederating to enforce, by fraud or violence.

A ground has been assumed, on behalf of the defendants, that this indictment is not supported, because it alleges that these checks, which the defendants conspired to obtain from Cammann, were of the value of \$4800, whereas from the proof, it appears that they had been paid by the Coopers, before they came into the possession of the defendants. In the progress of the trial, I have expressed an opinion, in which, on a further reflection, I am confirmed; that for the purposes of an indictment for a conspiracy, the value is immaterial. For, suppose a man should by fraud get my note, payable to himself, out of my possession, would he be permitted to say, True, I have obtained your note, but I ought not to be punished, because, while it was in your hands, it was of no value? Again, if the value is to enter into consideration, in a case of this description, then, if the checks of one who might be a bankrupt, were obtained from another fraudulently, it would be no offence. So, if there were to be an indictment for obtaining, by conspiracy, notes of the Bank of the United States, we might be involved in an investigation

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of the affairs of the bank to ascertain whether it was or was not able to pay its notes. This never could be the intention of the law; for if so, it would be necessary, in every case of this description, to go into endless investigations, for the purpose of ascertaining whether the property which was the object of a conspiracy was of value or not. Therefore, I still continue of the opinion, and so I advise you, that if you believe that the defendants conspired to obtain these checks fraudulently and contrary to the agreement, it does not lay in their mouths to say the checks were of no value. But, according to the testimony before us, these checks were of value. They had been delivered by the Coopers into the hands of Cammann, who was in the habit of negotiating them; and at any rate he had a right of retaining them for the purpose of offsetting against any claims that firm had against him; and it appears, from the testimony of Joseph Cooper, a witness for the defendants, that there were dealings between his firm and Cammann to a large amount, and that these checks were never paid otherwise than in accounts which remain unliquidated. Robbins knew the nature of the transaction between Cammann and the Coopers; on the 17th of November, Robbins entered into a negotiation with Cammann, by which the former agreed to pay the latter \$400, and stipulated to receive those checks as his security. This shows that he considered them of value; and, I think, precludes him now from being permitted to say they were not.

The defendants have endeavoured to impeach the testimony of Cammann; and, if in this they have succeeded to the satisfaction of the jury, the prosecution must fail, notwithstanding he is corroborated in his relation by that of Sandford. For, if the testimony of Cammann be excluded, or, which is the same thing, if you consider him unworthy of credit, then there is no testimony to connect Robbins with the transactions which occurred between Sandford and Sheffield. And, however unjustifiable Sheffield's conduct may have been, yet neither of the defendants can be convicted on this indictment, unless the testimony is sufficient to warrant a verdict against both.

For it has been truly stated by the counsel for the defendants, that on an indictment for a conspiracy, two, at least, must be found guilty. The acquittal of one of the defendants is, in this instance, therefore, necessarily the acquittal of the other also.

The general character of Cammann has been impeached by the testimony on behalf of the defendants, and supported by that on the part of the prosecution. In my view, it would be a very nice matter to decide on which side the balance of testimony on this point rested. For it is not to be determined by a mere enumeration of the witnesses produced on the respective sides. The character and intelligence of each witness, the opportunities he has had of knowing the party, circumstances that may create bias or prejudice, and the amount of the testimony of the respective witnesses, are all to be taken into calculation. This is a task that I acknowledge myself incapable of performing, on this occasion. And I am happy that it is not incumbent on me to attempt it, it being your province, and not that of the court, to weigh all these matters, and to decide on the credibility of a witness.

It is worthy of particular remark, however, that Joseph Cooper, a witness produced by the defendants, testifies, that he had dealings with Cammann to a large amount; that until the month of October last, there was no man in the community in whom he had more confidence, and that he never heard of any thing against his character until this affair occurred. Should you, therefore, find the testimony for and against his character balanced, it will be your duty further to inquire whether, from his conduct in relation to this transaction, his character stands impeached.

There has also been produced before us much testimony for and against the general character of Robbins. And here again I will not undertake to say on which side is the preponderance. Cases frequently occur where testimony of good character is useful: where the testimony is doubtful, if it come from an impure source, good character ought to be a protection; but common experience fully justifies the remark, that *the act of the man*, clearly established in a given case, is a much surer criterion to regulate our judgments

in determining a question of guilt or innocence than any testimony of general character. We must judge a man by his *deeds*, rather than by his *name*.

I shall now advert to the prominent circumstances relied on by the prosecution to establish the conspiracy.

The principal charge against the defendants is, that they obtained those checks fraudulently.

The first transaction, relative to these checks, between Cammann and Robbins, took place on the 17th of November, when he gave up two notes, amounting to \$329 due to him by Cammann, for the Coopers' checks, amounting to \$1250, and paid him, in cash, \$421.

On the 21st of November, Robbins agreed to give, in cash, to Cammann \$1420, for the Coopers' checks, to the amount of \$3850, and to carry \$2430 to his credit. On Wednesday, the 23d of November, Robbins paid \$400 to Cammann, and promised to pay him \$1000 on the 25th of November.

On this day, instead of paying to Cammann that sum due on the former agreement, he proposed a different arrangement: he wanted *more* of the Coopers' checks; and when Cammann proposed to him to pay the \$1000 first, he declined, and agreed to take of those checks to the amount of \$1300, and pay therefor \$2000, and the \$1000 due on the former contract, by a quarter after two o'clock on the same day. This was at about one o'clock.

At this stage of the transaction, Sheffield interposed. While Cammann and Robbins were discoursing together, Sheffield entered the counting-room. He was told by Robbins to go to Boggs & Thompson's and get \$2000; and when Sheffield asks him whether he should take a check, the only reply he received was, "Go."—When he returned, instead of bringing the check which he received, he brought the money, and *it was counted*, in a very particular manner, in the hearing of Cammann. This circumstance is worthy of some consideration, and we may ask, if there had not been a previous understanding between Robbins and Sheffield, is it probable they would have thus departed from the ordinary mode of transacting business of this description? And is it not a little extraordinary that the money should have been brought

by Sheffield in small notes, instead of the check?

Robbins then told Cammann to come at a quarter after two, when Sheffield would settle with him. Cammann objected to this on the ground that the dealings between himself and Robbins had been confidential; but he obviated this objection by saying, "Sheffield knows nothing of our dealings." This declaration was in favour of Sheffield, and if it were true, so far as to include the whole of these transactions, he ought to be acquitted. But does the testimony permit us to believe that Sheffield did not know, at least as much, as that by the agreement between Robbins and Cammann, Robbins had no right to receive from Cammann the Coopers' checks but upon the payment of the three thousand dollars? Immediately after this declaration, Robbins turned to Sheffield and said to him, in the hearing of Cammann, "Sheffield, I will give you \$3000 to pay Mr. Cammann, at a quarter after two; and he will give you Coopers' checks for \$4300." Sheffield, therefore, must have understood the nature of the agreement, at least so far as to know that Cammann was not to give up the checks of the Coopers' without receiving \$3000. At the time appointed, Cammann went to the store of Robbins and found Sheffield, who exhibited a check on the Branch Bank—he wanted Cammann to lay down the Coopers' checks before receiving that on the Branch Bank, which he declined doing; and Sheffield finally refused to settle, and referred him to Robbins.

The transactions wherein Sandford had an agency I shall not particularize, as they must be fresh in your recollection. And here again it must be recollected how frequently and particularly Sheffield declared to Sandford, that he well understood on what terms Robbins was entitled to the checks of the Coopers. Down to the very moment that Sheffield took them from the hands of Sandford, he let Sandford understand that he knew that Sandford was not to part with Coopers' checks without receiving Robbins' check for \$3000, with which, to deceive Sandford, he, as well as their previous interview, as at that time, had made such a parade.

Should you believe, that Sheffield,

at the time he obtained the checks from Sandford, in the manner represented in his testimony, knew the nature of the dealings between Cammann and Robbins, and that Sheffield, in obtaining the checks from Sandford in the manner he did, acted in pursuance of an understanding between him and Robbins, whether that understanding arose from the orders of Robbins to Sheffield, or from any other communication between them, I feel myself constrained to say that I think you must then conclude, that they did conspire as charged in the indictment, and it will be your duty to find them guilty; nor can I believe that the offer of the check of \$6000, by Sheffield to Sandford, should you believe that such offer, as has been contended, was made, would alter the features of this transaction.

It has been strongly urged by their counsel, that as Sheffield was the *clerk* of Robbins, and is to be presumed as having acted under the *direction* of his principal, there could have been no conspiracy between them; but, in the opinion of the court, this affords no justification, and ought not to exculpate the defendants from the charge alleged against them in this indictment. For if you should believe that Robbins did give directions to Sheffield to obtain those checks, in the manner he did, he is not the less guilty; for a clerk or servant is not bound to obey, nor is he justifiable in obeying, any other than the *lawful commands* of his master or principal. You are at liberty, from the circumstances, to infer a conspiracy; and you will inquire whether Sheffield, as he was not bound to follow unlawful directions, or those of an immoral tendency, would have taken the part which he did in this transaction, unless in pursuance of a confederacy between himself and Robbins.

Gentlemen, the representations we have had in the course of this trial of the practices of Wall-street are disgusting. And, if they be true representations, I think it very questionable whether the practices of Bancker-street, of which you have heard so much during this court, or of Wall-street, are most prejudicial to the community. If these transactions be the necessary consequences of wealth, commerce, and civilization, it would be bet-

ter to be without them : it would be better to live among savages than among men who are preying with such greedy avarice on each other. But I will not believe that the character we have had of Wall-street, is justly applicable to all who deal in it ; on the contrary, there are many respectable men whose business is in that street, and who, I trust, we may confidently believe, are honourable exceptions to the general character that has been given to its dealers. But, gentlemen, considerations of this nature, though not wholly foreign from the subject, ought not to influence our determinations in a particular case.

The jury found the defendants guilty ; and, on the last day of this term, Robbins was sentenced to imprisonment in Bridewell for six months, and to pay a fine of \$100 and the costs ; and Sheffield was sentenced to imprisonment in the same place two months, and to pay the costs.

In pronouncing the judgment, the mayor, after noticing several applications that had been made to the court on behalf of the defendants, and after recapitulating the prominent facts in the case, said, he would not undertake to say that if the defendants had been indicted as principal and accessory for a felony in obtaining the checks, as they had done, they would have been found guilty. But, on the other hand, said the mayor, I am by no means prepared to say, and I believe no lawyer would say that they might not, if a jury believed the testimony which was given on this occasion, have been convicted of these high offences, the punishment for which would have been imprisonment in the state prison for years. If these checks were taken and detained from the owner without his consent, and by fraud and violence, they were feloniously taken. Nor is there, in the judgment of the court, any single fact, proved by the testimony on either side, that mitigates the character of the transaction. So far from any thing having appeared to induce a belief that either of the defendants thought Robbins had a right to these checks, their whole conduct shows that they well knew that no such right existed. And, therefore, they resorted to fraud, artifice, deception, and violence to obtain them.

SUPREME COURT OF JUDICATURE OF THE STATE OF NEW-YORK.

Before the Hon. SMITH THOMPSON, Chief Justice, on Monday, the second day of November, of the term of October, in the year of our Lord one thousand eight hundred and eighteen.

JAMES FAIRLIE, Clerk.

(CERTIORARI—TRIAL AT BAR—JUDGMENT
BY CONFESSION—CONSPIRACY.)

ROBERT M'DERMUT, ANDREW S. GARR, AND GEORGE CAINES' CASE.

VAN WYCK and BOGARDUS, Counsel for the prosecution.

D. B. OGDEN, Counsel for M'Dermut, and EMMET and SLOSSON, Counsel for Garr and Caines.

A Certiorari, issuing from the Supreme Court to the Sessions, on the motion of two defendants indicted with another for a misdemeanor, is effectual for the removal of the indictment against the whole, though the third doth not participate in the motion.

Should the public prosecutor, for the purpose of supporting an indictment for a conspiracy, produce in evidence an injunction from Chancery, previously obtained in favour of either of the defendants on trial, and also a notice of a motion in the Supreme Court, and the rule obtained thereon in their behalf, they are entitled to the benefit, as well of the allegations contained in the bill upon which the injunction was granted, as of those in the affidavits upon which the motion was founded.

It seems, that to sustain an indictment for a conspiracy, it is incumbent on the public prosecutor to show, that two or more persons confederated together to do an act known by them at the time to be unlawful and without colour of right ; or to prove some facts from which such a confederacy can be reasonably inferred.

On the 17th day of April, of the term of April last, in the Sessions in and for the City and County of New-York, an indictment was found against the defendants, for a conspiracy. This indictment alleged, in substance, that on the 27th day of February, 1818, M'Dermut, being a bookseller, and Garr and Caines, attorneys at law, they wickedly and unlawfully conspired to cause and procure a judgment in favour of M'Dermut, against one

Daniel D. Arden, for \$20,000, debt, and \$16 11, damages and costs, to be rendered in the Supreme Court of Judicature of this state, by which an execution might be issued against Arden, and with an intention that his property might be levied on; and that, in pursuance of such conspiracy, on the day last aforesaid, Caines, as the attorney of Arden, signed common bail and a *cognovit* for that sum, and that Garr, as the attorney for M'Dermut, by virtue of the common bail and *cognovit*, caused a judgment of the above description to be entered of record, in the office of James Fairlie, one of the clerks of the Supreme Court; whereas at the time Caines signed the papers he was not the attorney for Arden, *the defendants well knowing the same*, and whereas he never authorized the defendants, or either of them, or any other person, to sign common bail, &c. they knowing the same, and that at the time of the rendition of the judgment, it was without the authority and against the consent of Arden; by means of which he has been put to great expense, &c.

The defendants having pleaded not guilty, on the 18th day of April, Garr and Caines sued out a writ of certiorari, for the removal of all indictments against them in the Sessions into the Supreme Court. This writ was returnable on the first Monday of May then next, and was duly allowed by the Recorder, and sealed and delivered to the court below, on the same day it was sued out, with a recognisance, according to the form of the statute, (1 vol. R. L. p. 141, sect. 4.)

The Recorder, who presided in the Sessions at the time of the service of the certiorari, conceiving that the cause was not removed, inasmuch as M'Dermut had not joined in it, ordered a special return to be made to that writ, and appointed a day for the trial. Messrs. Garr and Caines, therefore, on the 7th of May, applied to the Supreme Court, and obtained a rule, requiring the court below to return the indictment.

At the time the writ was served, and also at the time of the application to the Supreme Court for the rule, Messrs. Caines and Garr produced the following authorities.

"If A., B., C., and D., be actually indict-

ed in one indictment for one offence, and a certiorari be to remove all indictments against A. and B., this will be sufficient to remove the indictment against A. and B., and also it removes the indictment as to C. and D., for the justices may deliver the indictment *per manus proprias*. M. 37 and 38., El. B. R. Woodward's case, contra 6 E. 4, 5, a.

"But if the indictment be but one, but the offences several, as if A., B., C., and D., be indicted by one bill for keeping several disorderly houses, a certiorari to remove this indictment against A. and B., removes not the indictment as to C. and D.; for though they are all comprised in one bill, yet they are several indictments and several offences, and so the record is in the King's Bench virtually and truly as to A. and B., but as to C. and D. the record remains below.

"But if the justices *per manus suas proprias* deliver the bill into court against all of them, as they may, then, if a record be made of that delivery, the indictment is entirely removed against A., B., C., and D., because not done upon the writ of certiorari, but *per manus suas proprias*. But otherwise it is, where the offences are several, and the indictment against A. and B. is removed by writ, and by a return endorsed upon the writ, for then that single indictment, that concerns A. and B. is removed, and not the others, where the offences are several, and severally charged.

"But as I said, if there be one indictment against A., B., C., and D., for one murder or burglary, another against the same persons for robbery, and a third against the same persons for a rape, a certiorari to remove all indictments against A. and B., removes all these several indictments against A., B., C., and D.; for though in law each of them be severally a felon, yet, inasmuch as they are jointly charged, they shall be all removed as to A., B., C., and D., by virtue of this one writ, contrary to the opinion of Markham. 6 E. 4, 5, a."—(Hale's Pleas of the Crown, Vol. 2, p. 213, 214. Part 2, chap. 27.)

"A writ for the removal of all indictments against A. may remove an indictment against A. and twenty others, so far at least as it concerns him; because, in

judgment of law it is a several indictment against each defendant." "But per 2 Hawk. P. C. chap. 27, sect. 35, it is not agreed whether, in such a case, the indictment shall be removed, so far as it concerns the other twenty."—(1 Bac. ab. tit. Certiorari I. Vol. 1, p. 573.)

"A certiorari issues bearing teste the last day of Trinity term to remove all indictments against A. and B., returnable *tres Michaelis*; at the Quarter Sessions it is delivered, and then an indictment is found against A., B., and C. Ruled." (Inter alia.)

"That such a certiorari to remove all indictments against A. and B., removes all indictments wherein A. or B. are indicted, either alone, or together with any other person." M. 22, Car. 1, B. R. Orfener's case adjudged. 1 R. 3, 4, b. 6 H. 7, 16, a. The same points resolved in Cheyney's case. 1 R. A. 396, pl. 1, 2."—(Hale's Pleas of the Crown, Vol. 2, chap. 27, p. 212.)

See also 4 Viner, 337, pl. 3—"If a certiorari issues to justices of the peace to send the indictment of J. N., and in the same indictment twenty others are indicted, yet this is a good certificate of the record, and the justices of the peace shall not mention any thing of the others in their certificate.—Per Markham Ch. J. Br. Record pl. 57, cites 6 E. 4, 5."

"Two being indicted, one of them removed it by certiorari, *entering into recognisance to carry it down to trial*; and it was resolved, that the indictment was removed quoad both, and that *the defendant who removed it saves his recognisance by TRYING IT AS TO HIMSELF*; for that the acquittal of one is not an acquittal of the other, nor vice versa; neither can it be exacted of him to try against both; and that, notwithstanding the *other defendant* had appeared below, and now by the removal is put without day, wherefore, if he *do not come in above gratis*, process of outlawry shall go against him, &c. &c. &c. And if two be indicted jointly, and join in plea, there shall go but one venire facias; secus if they sever."—(4 Viner, 333, pl. 7.)

"It is taken for granted in many books," (6 Ed. 4, 5, pl. 13. Bro. Record, 57. Lamb. B. 4. chap. 7, fol. 517. Crompt. 132 a. Dalt. ch. 134. March,

112,) "neither do I find it any where denied, that a certiorari for the removal of all indictments against A., may remove one wherein the said A. is indicted together with twenty others, so far as it concerns him; because, in judgment of law, it is a several indictment as to every one of the persons indicted. But I do not find it agreed, whether in such a case the indictment shall be removed so far as it concerns the other twenty."—(Affirmed 6 Ed. 4, 5, pl. 13. Bro. Record, 57. Lamb. B. 4. ch. 7, fol. 517. Crompt. 132 a. Dalt. ch. 134. Denied March, 112. 1 Keb. 231, pl. 51.)—2 Hawkins' P. C. ch. 27, sect. 35, p. 296, 5th ed.

"If divers be indicted in the same indictment, and some of them find sureties and others not, the indictment ought to be removed as to those who find sureties, because they shall not be prejudiced by the default of the others. (March 27.) And, as some say," (1 Keb. 231, pl. 51. Vide 6 Ed. 4, 5, a, March 111.) "it shall be removed as to the others also."—2 Hawk. P. C. ch. 27, sect. 55, p. 292, 5th ed."

In obedience to the rule, the indictment was returned on the 9th of May, on which day Garr and Caines appeared, and pleaded and moved the court to appoint a time for the trial. It was the opinion of the court, that, under the statute above cited, the trial could be had only at bar; the indictment having been found in a county in which the Supreme Court sits, and as there was not sufficient time remaining in that term to summon a jury, October term was appointed for the trial.

Garr and Caines accordingly gave notice of trial for that term to the prosecutor and the district attorney, and delivered a venire for a jury to the sheriff.

The jurors appeared on the return of the venire, when the court appointed Wednesday, the 21st of October, for the time of the trial. In the mean time the district attorney moved for process to bring in M'Dermut, which was granted, and, after its having been served, he appeared, and pleaded not guilty.

The district attorney then objected to the panel of jurors returned by the sheriff, who had summoned what is usually called the sheriff's jury, instead of draw-

ing the names out of the box. The court thereupon ordered a new venire to be issued, returnable on the 29th of October, on which day the jurors summoned, whose names had been drawn by the clerk from the box, appeared.

Mr. Ogden, counsel for M'Dermut, challenged the array, on the grounds, that the names of the jurors to be summoned should have been drawn by the clerk at least fourteen days before the sitting of the court; and that there should have been fifteen days between the teste and return of the venire.

The court, after examining the act, (1 vol. R. L. p. 325,) and the former acts on the subject, decided, that it was not necessary, in the city of New-York, that the names of the jurors should be drawn fourteen days before the sitting of the court. The court also overruled the objection relative to the teste and return of the venire, and adjourned the cause to Monday, the 2d day of November.

Van Wyck, after opening the case on behalf of the prosecution, produced an original judgment record, purporting to have been signed by the recorder of this city, and filed in the office of James Fairlie, one of the clerks of the Supreme Court, on the 27th of February, 1818. The judgment appeared to have been entered up in debt, on a bond, bearing date on the 23d of April, 1817, in favour of Robert M'Dermut against Daniel D. Arden, in the penal sum of \$20,000, conditioned for the payment of \$10,000, with interest, on the first day of June then next. It also appeared, from the proceedings, that Andrew S. Garr was attorney for the plaintiff, and George Caines appeared for the defendant, and signed a cognovit and common bail piece, as if on a warrant of attorney. A satisfaction piece was attached to the record, which appeared to have been acknowledged by M'Dermut, in proper person, on the 29th of April, 1818, and filed on the 4th of May following.

Daniel D. Arden, on being sworn as a witness on the part of the prosecution, stated, that he never authorized Mr. Caines to appear as attorney and confess a judgment, in any court.

In his cross-examination, this witness further stated, in substance: On the 23d

of April, 1817, when the bond aforesaid was executed, I executed to M'Dermut a warrant of attorney, in the usual form, to enter up a judgment. The object of giving the bond and warrant of attorney was to secure to M'Dermut the payment of that part of the debts due by the late firm of M'Dermut & Arden which I was to pay on the dissolution of the partnership. On the 17th of October, 1817, wanting to borrow some money, I applied to one Abijah Weston, who lent it to me, and took a receipt; after which he said to me, "I hope you have no lien on your property." It then occurred to me, that this bond and warrant of attorney were in the hands of M'Dermut. I then mentioned the circumstance to Weston, and told him, that the object for which it was given had been accomplished; but he expressed some reluctance at advancing the money while those papers were in the hands of M'Dermut; and I went to him and informed him of this negotiation with Weston, and requested him to give up the bond and warrant of attorney, as the object for which they were given was accomplished by the payment of the debts of the firm. He gave up this warrant of attorney to be destroyed, as I thought, with pleasure; but said that the bond could not be found. I then went to Weston, and got the money he had promised to lend. At the time I took the warrant of attorney, I gave to M'Dermut a memorandum or receipt, for the purpose, as he said, of specifying that he no longer held the warrant of attorney.

On the 27th of February, 1818, Mr. Garr called on me, and presented me with three promissory notes in favour of Robert M'Dermut, signed with the name of the partnership firm, "R. M'Dermut & Arden." The first was for \$2000, the second for \$1028, and the third for \$700. He demanded payment. He also demanded the warrant of attorney, or that I should execute another. I was so much astonished at demands I considered so extraordinary, that I told him, that as I had no counsel I knew not what to say, or what answer to make.

I have never said that my whole existence depended on the conviction of M'Dermut; but I have said that I was much interested.

Slosson, hereupon, exhibited to the witness the three notes above mentioned; the first of which (in the order stated) bears date on the first of March, 1817, payable three months after date—the second on the 14th of February, 1817, payable three months after date, and the third on the 6th of November, 1816, on demand. The counsel also showed the witness a receipt in these words and figures:

“Received from Robert M'Dermut the warrant of attorney which I had granted him on the 23d of April, 1817.

(Signed) DANIEL D. ARDEN.”

The witness, on being further cross-examined by Slosson, stated that those notes and that receipt were in his own handwriting; and that these were the same notes of which Garr demanded payment, and the receipt was that which the witness gave when he received the warrant of attorney from M'Dermut.

I had, continued the witness, suffered one note of about \$200 to lie over before the 27th of February, 1818, but it was paid before that time; and about that time I suffered my bank notes to lie over.

I am certain that Garr demanded of me to give up the old warrant of attorney or execute another. I informed him that it was destroyed, or he told me so: it was a matter perfectly understood between us. Mr. Garr came in a hostile manner; I was afraid, and answered with some hesitation.

In the beginning of April, 1818, I had a settlement with Mr. M'Dermut, and we executed mutual releases both as respected our partnership and private concerns.

Mr. Slosson handed the witness the draft of an affidavit, as if prepared to be taken by the witness, dated 10th of April, 1818, stating that he did not believe that in entering up the judgment, either Caines or Garr acted with malice, but were solely actuated by zeal for their client, believing the statement of facts made to them by him to be correct.

In relation to this paper the witness said, Mr. Garr came to me and asked me if I supposed he had any malice against me in entering up the judgment. I told him that I did not believe that he had, as I supposed he acted for M'Dermut. He

afterwards brought an affidavit for me to take. I gave it my general assent; and, taking it, told Garr that I would show it to my counsel, and that if he advised me so to do, I would make the affidavit.

Mr. Slosson, hereupon, read the paper, the substance of which is above set forth, when the witness proceeded: I was willing to swear to this, I wished to save Caines and Garr from difficulty. Without looking at the paper, I took it to Mr. M'Garaghan, my counsel, and said, “Here is a paper I wish you to advise me not to sign!” and, without looking at it, he so advised me.

Before the entry of this judgment, I had not been sued for any demands on my own account. About a year before the dissolution of our firm, I gave out that I was going to New Orleans to commence business; and that was the principal object of our dissolving partnership. I let my bank notes lie over that I might be compelled to bring my affairs to a crisis, and that I might be enabled to pay off my confidential debts; but I did not contemplate bankruptcy.

Mr. Slosson, hereupon, produced, and read to the jury, a sealed agreement between M'Dermut & Arden, bearing date on the 23d of April, 1817, by which it was, among other things, agreed, that “all the debts on bond, book or note due to the house, shall, together with all books, papers, and vouchers, relating to the same, be assigned to Robert M'Dermut, as the attorney in fact for the concern; and he agrees to collect them as far as practicable by law or otherwise, and apply the same to the amount due him, without further charge or deduction than the expenses actually incurred, &c., and the said Arden agrees to contribute and pay one half of each and every claim and demand now owing by the house, as the same shall respectively be due and payable; and at the end of one year to settle, adjust, and pay, to M'Dermut such sum as shall be then found still due to him from said Arden, and remaining unpaid. And as security for the performance hereof, he agrees to grant to the said M'Dermut a warrant of attorney sufficient to cover all such sum or sums; to be entered up for the whole amount due, on any default or neglect to contribute and pay as here-

in stipulated. And further he agrees that he will not make any assignment of his property, grant any warrant of attorney, or suffer any judgment to pass against him, without giving M'Dermut timely notice," &c.

The counsel also produced an account in favour of M'Dermut against the firm, from which it appeared that the net cash balance, due to him on the first of May, 1818, was or would be \$22,581 64.

These papers were admitted to be in the handwriting of Arden. The bond upon which the judgment was entered was here read in evidence to the jury.

Mr. Ogden here exhibited to the witness certain books of account, which on inspecting the witness said, this statement in the book was made in 1816, and before the dissolution of the partnership. It was made at the time of taking the inventory on the first of January in that year. This is an old account. I have not seen the books since they went into the hands of Mr. M'Dermut.

Being directly examined by Van Wyck, the witness further stated as follows: The three notes due by the firm to M'Dermut, and of which Mr. Garr demanded payment, were not a part of that which by the terms of the agreement I was to pay: these were considered between us as *private debts* due to him, and were, therefore, not included. The agreement merely related to outstanding debts.

Emmet objected to this evidence, on the ground that parol testimony ought never to be admitted for the purpose of varying the terms of a sealed instrument: the covenant must interpret itself.

By the Court: I understand the rule to be as you have stated; and I think it is applicable to this case. You cannot resort to parol testimony to explain this instrument.

The witness proceeded: This note of \$2000 was given, some time anterior to its date, for moneys due from the firm to M'Dermut. This was the case with the rest. The interest upon them was regularly paid, and they never were out of his possession. They were never *outstanding debts*, but due to him in his private capacity.

The reason I called on M'Dermut
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for the warrant of attorney, was because Weston, before he would advance the money, required that the warrant should be destroyed; and at the time I called on M'Dermut for it, I told him this explicitly.

I never made an assignment, for the purpose of giving a preference to other creditors, until after an execution on this judgment was levied on my property; and that assignment was never acted on; and no other judgment existed against me, except one for about \$120 in which I was bail.

After I made the complaint to the grand jury, M'Dermut importuned me to make a settlement, the basis of which was that he was to take certain demands of the firm in payment of that which was due to him: Caines never spoke to me on the subject.

Van Wyck hereupon proceeded to read an injunction issuing from the court of chancery, tested on the 1st of April, 1818, directed to Daniel D. Arden, his counsellors, &c. suggesting that the complainant, M'Dermut, had in his bill set forth, that he had caused a judgment to be entered up in the supreme court against said Arden, upon a certain bond and warrant of attorney, mentioned in said bill, and that Arden intended to proceed at law against him for entering up said judgment and issuing execution thereon; and that said Arden was disposing of his property, contrary to his agreement mentioned in the bill respecting the same. The injunction, therefore, proceeds to enjoin Arden from proceeding at law against M'Dermut, or his attorneys employed in entering up judgment against Arden, or in any manner harassing or vexing him or them therefor, or applying to the supreme court to set aside said judgment for want of filing the said warrant of attorney, and from bringing a writ of error thereon, or from disposing of his property contrary to his agreement, until he shall have fully answered the bill.

The witness then stated that the injunction was served on him on the 5th of April, 1818, about which time he went before the grand jury; that in the May term he went into the supreme court, and heard Mr. Caines make a motion in

the cause upon which the judgment was entered ; the object of which motion was to obtain a rule for the witness to sign a release of errors, or something else ; and the rule was obtained.

Van Wyck hereupon read a notice of an application to be made to the supreme court on the first Monday of May, then next, (the notice being dated on the 27th of February, 1818,) for a rule requiring Arden to file the warrant of attorney, or release errors in entering up the judgment. Annexed to this notice, for the purpose of supporting the motion, were the several affidavits of Robert M'Dermut and Andrew S. Garr.

The affidavit of M'Dermut, after setting forth the purpose and intent for which the bond and warrant of attorney were executed by Arden, states that he "*obtained from the deponent the said warrant of attorney under a pretence of wanting to show it to a friend, giving to the deponent a receipt therefor, which he took as a memorandum of the defendant's having such warrant in his possession, and under the expectation of having the warrant returned to the deponent, whenever he might want the same to enter up said judgment ; that Arden had refused to deliver up the warrant of attorney, and was disposing of his property to defraud the deponent of his just demand, and prevent his entering up the judgment : that the deponent had caused a judgment to be entered up on the bond without having the warrant of attorney in his hands, or filing the same ; and that there is now due to the deponent, from the firm of M'Dermut & Arden, above the sum of \$10,000.*

The affidavit of Garr stated, that when he demanded the warrant of attorney from Arden, he replied that he was not advised what answer to give.

From the testimony of Richard Riker, Recorder of New-York, it appeared that on the 27th of February, 1818, a young gentleman who is in Mr. Garr's office, handed him the judgment record and other papers for him to sign the judgment and tax the costs : that he looked on the bond and a paper, which he has ascertained since was a release of errors, and thinking that this was the warrant of attorney, he taxed the bill and signed the

judgment, without particularly examining the papers, having no doubt but that the warrant of attorney was among them. Scarcely had the proceedings passed the office, when Mr. Arden and Mr. M'Garaghan came into the office, and informed him that the judgment had been entered up without a warrant of attorney. On an application made by them, founded on affidavit, the witness made an order to deliver up to the defendant the goods that the sheriff had levied upon under the execution. Afterwards M'Dermut, Garr, and Caines, made an application to the witness, founded on an affidavit, stating, among other things, that if the property levied on went into the hands of Arden, it would be lost. The witness made another *ex parte* order, directing the execution to stay, but that it should remain in the hands of the officer who made the levy.

Anthony Dey, counsellor at law, on being sworn on behalf of the prosecution, stated, that on the 27th of February, 1818, he was in the recorder's office, when M'Dermut asked him to become concerned, as counsel, in the affair with Arden : that afterwards the witness had several conversations with Mr. Garr, relative to his entering up the judgment : that in one of these conversations at his office, the witness observed to him that he had got himself into a scrape, to which Garr replied that he had not, for he had a receipt which Arden gave M'Dermut for the warrant of attorney. The witness asked him why he did not go to Fairlie to have the judgment signed, and Garr replied that he knew Fairlie would examine the papers. The witness had a conversation with M'Dermut, and he would not give up an inch.

After the injunction was granted, Arden expressed his determination of applying to the grand jury ; but the witness advised him against the measure, as he might thereby bring himself into a contempt of the court of chancery ; and the witness thinks that after the indictment had been found, Arden would have been glad, if possible, to have stopped the proceedings. The witness further believes that Mr. Garr acted in good faith and from a mistaken zeal for his client.

After the judgment was entered, the witness went to the recorder and told him

there was no warrant of attorney : he said there was, and the witness then got the papers from the clerk's office and showed them to the recorder, who said that when he signed the papers he thought the release of errors was the warrant.

From the testimony of Isaac Kip, a deputy sheriff, it appeared that John P. Roome made the first levy on the property of Arden, by virtue of the execution issued on this judgment, at twelve o'clock on the same day the judgment was entered up ; the execution having been delivered into the hands of the sheriff, at twenty minutes past eleven o'clock. Afterwards the sheriff sent for the witness, who found M'Dermut in the office, when the sheriff requested the witness to go down with the execution and take the property, or it would be removed. He went down and secured the property.

Ogden, hereupon, offered to read the bill in chancery in evidence to the jury.

Van Wyck objected ; but the court decided that inasmuch as the injunction in chancery, founded on the bill, had been read in evidence on behalf of the prosecution, the defendants were entitled to the benefit of the facts contained in the bill as evidence in their favour.

The counsel, hereupon, read the bill, which was very voluminous. In the stating part of the bill, the agreement under seal, before mentioned, is set forth ; the object of the judgment bond and warrant of attorney was stated as follows : that as on the dissolution of the firm the sum of \$20,000 was due to M'Dermut by the firm, and as Arden was totally unable to pay or contribute his proportion towards the payment of that debt or other debts due by the firm, unless from the debts due to the firm, and as M'Dermut, from his sole and separate funds, was able to contribute his full share towards the payment of those debts due by the firm, though the debts due to the firm should be deficient and lost—therefore, Arden, as well to protect M'Dermut against any loss which might accrue by reason of his having to pay more than his proportion of the debts, as to secure the debt due to M'Dermut in his separate capacity, and also to protect him against any fraud which might be practised in contravention of the agree-

ment, proposed to give the judgment bond, &c. The bill further states, that a short time after this, Arden called on M'Dermut, and requested him to let him have the warrant *that he might show it to one of his friends, and that M'Dermut's confidence in him should not be misplaced, giving him to understand that it should be returned.* That he delivered the warrant to Arden in confidence, who afterwards neglected to contribute his proportion of the outstanding debts of the firm, particularly three notes, amounting to more than \$3000 : that Arden had become much embarrassed, and instead of contributing his proportion of those debts, or those due M'Dermut in his individual capacity, he was assigning over his property, and had declared *that he never would pay any part of those debts until he had paid and secured his confidential creditors :* that a demand was made of the warrant of attorney of Arden, who refused to deliver it ; whereupon M'Dermut caused a judgment to be entered up on the bond in the supreme court.

In the confederating part of the bill it is alleged, that Arden is about to proceed at law to set aside the judgment, and had made an affidavit setting forth that the warrant " was by mutual consent delivered up."

After the interrogating part of the bill, its prayer follows ; it was sworn to on the 17th of March, and the injunction, the substance of which is above set forth, was granted according to that prayer, as appears from the order for the injunction granted by the chancellor himself at Albany, on the 23d of March, 1818.

Emmet hereupon stated, and it was admitted on behalf of the prosecution, that on the very day on which the judgment was entered up, a bill in chancery was prepared on behalf of M'Dermut against Arden, the allegations and prayer in which, were conformable to that in the bill read in evidence.

Francis Arden, master in chancery, authorized to grant injunctions in the city of New-York, under one of the rules in that court, on being sworn, testified, that on the 27th of February, 1818, a bill in chancery was presented to him by Mr. Garr, in the case of Robert M'Dermut vs. Daniel D. Arden, the prayer in

which bill was that Arden be enjoined from proceeding at law to set aside the judgment, and from disposing of his property. The witness rejected the application, because he had no power, under the rule of court upon which his authority in such cases is founded, to grant an injunction for any other purpose than to stay proceedings at law.

Ogden here suggested to the court whether, under the circumstances, the defendants were bound to proceed further. This appears to have been a mere dispute about private rights; the parties, in relation to those matters, from which alone a conspiracy could be inferred in ordinary cases, swear directly contrary to each other; and, according to the course the cause has taken, as well the allegations contained in the affidavits, read in the supreme court on the part of M'Dermut, as those contained in his bill in chancery, have been made evidence for the defendants.

Van Wyck: The gentleman is rather premature in his suggestions. We have more testimony, and shall be able to show the material allegations in the bill utterly untrue.

By the Court: At this stage of the cause I think proper, without expressing any decided opinion, to throw out the impressions on my mind, for the consideration of the counsel.

It seems to be admitted, that the allegations contained in the bill in chancery, by the course the cause has taken, are good evidence for the defendants. Those allegations, in their material parts, are in direct contradiction to the statements of Arden. Now the public prosecutor proposes to show that those allegations are untrue: but it is to be recollected that this prosecution is for a *conspiracy*, which may be denominated a confederacy, *between two or more persons*, to do an unlawful or immoral act to the injury of others. Admitting, therefore, that the district attorney can show that M'Dermut is forsworn, yet, it does not follow that Caines and Garr were implicated with him in a conspiracy, or knew that the representations he made to them were untrue.

They did, no doubt, what they ought not to have done; they ought not to

have entered up the judgment without the warrant of attorney; but if, at the time of their retainer, they believed the representations of M'Dermut to be true, they stand acquitted of any criminality in that transaction.

D. D. Arden was again called on behalf of the prosecution. All the *outstanding debts* of the firm, said he, were paid in two or three months after the contract, on the dissolution, was made; the remaining debts were not to be paid before the end of the year: this M'Dermut acknowledged to me was the case. Those three notes demanded of me were those mentioned in the account; and the payment of the balance was put off till the end of the year.

The reason that M'Dermut proceeded to enter up the judgment was, because he supposed I was going abroad; and he was, therefore, very solicitous that I should make a lumping bargain. A few days before the 27th of February, he wanted me to come to his house; and shortly after this interview he met me in the street, and observed to me, "you have not been down:" his object was to make me make a lumping settlement. I proposed to him to take the debts due to the firm towards what was coming to him: he refused; but after I complained to the grand jury, he compromised all the business on my own terms.

I am positive that when Mr. Garr called on me to demand payment on the notes, either he or myself mentioned that the warrant of attorney was destroyed.

By the Court: Why did you not at this time tell Mr. Garr that the warrant of attorney had been given up to be cancelled?

A. When he made the demand I was so much astonished that I did not know what to say.

Aaron H. Palmer, Esquire, testified, that the first bill in chancery was sworn to before him on the 27th of February, 1818.

Van Wyck here read passages from the 1st vol. Hawkins, 178, and from the 3d vol. Chitty's Crim. Plead. 1138, to show that any confederacy for the purpose of accomplishing an unlawful act, is a conspiracy; and he read a passage from the same volume of Chitty, (p. 1141,) to

show that an actual conspiracy need not be proved, but may be inferred by the jury. The ground we shall assume, in this case, said the counsel, is, that the defendants agreed to enter up this judgment without the warrant of attorney, knowing that such entry was contrary to the form of the statute. In the "Act concerning Counsellors, Attorneys, and Solicitors," (1 Rev. Laws, p. 416,) in the latter part of the third section, it is enacted, "that every attorney who shall confess any judgment in any case, shall, at the time of making such confession, produce his warrant for making the same to the court or judge, before whom he makes the confession; and the warrant shall then be filed with the clerk of the court in which the judgment shall be entered." As the defendants, therefore, agreed to enter up this judgment without the warrant of attorney required by the statute, they agreed to do an unlawful act, which is a conspiracy.

Slosson: I shall address the court, very briefly, on the law applicable to this case. The statute which has been read, it is true, requires the attorney who confesses a judgment, at the time of making the confession, to produce his warrant for making the same to the court or judge before whom he makes the confession; but the statute does not render the omission, to produce such warrant to the court or judge, a criminal offence. The second section of the same act, requires, "that all warrants of attorney of the parties in all actions and pleas in every court of record, shall be taken before a judge;" but every person, in the least acquainted with the practice, knows that these warrants of attorney are uniformly added by the clerks in attorneys' offices at the end of the declaration, and of the plea, and, in the greater number of cases, are never seen by a judge. But it will be perceived by the court that the clause of the statute upon which the opposite counsel rely, applies as well to a *cognovit actionem*, given after a suit has been commenced, as to a confession by virtue of a warrant of attorney; and yet, who ever heard of an attorney producing to the court or judge the warrant of attorney for making the confession, after a suit has been commenced?

In the case of *Denton vs. Noyes*, (6th Johns. Rep. 296,) it was held by the court, that although an attorney appear for a defendant, and confess a judgment without a warrant of attorney, yet the judgment entered is good.

In the cause of *Romeo Wadsworth vs. Lewis Caldwell*, decided in the Supreme Court, in January term, 1818, these facts were disclosed by affidavits: Caldwell had given Wadsworth a bond and warrant of attorney to confess judgment, for the purpose of securing certain moneys due. In January, 1818, while this money was due, Caldwell fraudulently obtained the bond and warrant, and tore it; the court being then sitting, an application was made to it, and parts of those instruments being produced to the court, whereon were the seals and signatures of Caldwell, the names of the parties and that of the subscribing witness, the date and the sum due; the court ordered that Wadsworth have leave to enter up the judgment on the bond; and that any attorney in that court should be permitted to enter judgment thereon as if the warrant of attorney was entire.

I contend, therefore, that the actual filing of the warrant is not essential to the validity of a judgment; and I have no doubt but that if M'Dermut could have applied to the Supreme Court they would have given him leave to enter up this judgment without the warrant of attorney.

Einmet cited Tidd's Practice, 495, to show, "that a warrant of attorney to confess a judgment is not revocable." *Oades vs. Woodward*, 7th Mod. 93, per Holt, C. J. "If there be a warrant of attorney to confess a judgment, and afterwards the defendant come and revoke it before it is entered, yet the attorney shall enter it, notwithstanding the revocation; and the course of the court has been so time out of mind; and the course of the court is the law of it."*

The defendants' counsel offered to submit the case to the jury without summing up; but the opposite counsel refusing to

* We deem it useful to collect authorities on the subject of attorneys appearing for parties without authority: 1 Viner, 576, pl. 4, 6, 7, and 8; 3d ib. 306, pl. 11. *Alleley vs. Colley*, Cro. Jac. 695. *Adams vs. Ward*, Winch. 90. *Denton vs. Noyes*, 6th Johns. 296, and authorities there cited.

do the same, Ogden addressed the jury, and said, that this was an extraordinary prosecution. A private dispute took place between M'Dermut and Arden, concerning property; and if he had been injured, the courts of civil jurisdiction were open for that purpose. Instead of applying to a civil tribunal, we find him resorting to a criminal prosecution, for the purpose of shutting out the testimony of some or one of those whom he had endeavoured to implicate in this transaction.

The real parties in this controversy, M'Dermut and Arden, swear directly contrary to each other. Here is oath against oath—a balance of testimony; this must create a doubt in the minds of the jurors; and if they doubt, they must acquit. This is not a question between M'Dermut and Arden which the jury are to try; but whether M'Dermut, Garr, and Caines conspired; and unless the jury believe that there was a *confederacy* for an unlawful purpose, they must acquit.

M'Dermut, being involved in difficulty with Arden, goes to an attorney for counsel, who gives him such advice as he conceived would the most effectually promote the interests of the client—advice which any gentleman of the profession, under the extraordinary circumstances of the case, would have given. The warrant of attorney, given to M'Dermut for the express purpose of securing the payment of Arden's proportion of the partnership debts, and protecting M'Dermut against fraud, had been obtained by a stratagem; and there was no other mode for saving himself, except the entry of the judgment.

But even admitting that Caines and Garr acted erroneously, and that *they* conspired to do so—admitting that M'Dermut has forsworn himself in the bill in chancery, (and this, but for the purpose of the argument, I by no means admit,) still I contend, that before you can find M'Dermut guilty, under this indictment, you must be convinced that he conspired with them.

After Mr. Ogden had closed his address to the jury, James L. Bell, the sheriff, on being sworn on behalf of the defendants, produced his books, and testi-

fied, that by a reference thereto, he found that there was an execution issued on the 2d of February, 1818, in favour of Israel Corse against Daniel D. Arden, for \$109 57, which was paid by the defendant on the 27th of the same month.

Elam Bliss was sworn as a witness on behalf of the prosecution; but testified to nothing material to the merits of this case.

Emmet, in the commencement of his address to the jury, said, that he appeared as counsel for Garr and Caines only. This was a most extraordinary prosecution against two gentlemen of the profession, for having given an opinion, and acted according to the best of their judgment; and without any assignable motive, except the paltry sum of \$19, which Garr gained by entering up the judgment, these two defendants were charged with a foul conspiracy with M'Dermut.

Where is the evidence of a conspiracy? It is said, by the opposite counsel, and authorities have been cited in support of the principle, that a conspiracy may be inferred from the *facts*. But let me tell the learned gentleman that he is not to make out too much by *inference*. Let him, before he attempts to *draw the inference*, fix upon the fact. I cannot think that inferences, without facts to support them, will be indulged by the jury. My clients acted honestly and in good faith, if they believed the representations of M'Dermut to be true; for it appears, by the granting of the injunction, that his statements were believed, and their proceedings were sanctioned by the chancellor.

Whether, in entering up this judgment they acted right as professional men, is not the question for you to decide: but, in the words of this indictment, did they act wrongfully and maliciously? And here I am ready to concede to the gentleman, that it is not necessary to prove an *actual conspiracy*; but I do contend, that it is incumbent on him either to prove an actual conspiracy, or such facts as could have been the result only of a conspiracy. And I now appeal to the jury, whether, from a single fact in this case, they can draw a rational inference, that my clients acted maliciously, and with an intent to vex and injure the prosecutor.

The counsel addressed the court, and argued that although in practice the entry of this judgment in vacation, without a warrant of attorney, might be considered a bold measure, yet, according to the statute relied on, it was not essential to the validity of the judgment. If the statement of M'Dermut be true, and this we are authorized to assume, then the authority contained in the warrant of attorney to enter up this judgment continued, notwithstanding it was in possession of Arden: this authority was coupled with an interest, and, according to the authorities read, is irrevocable.

Let us, for a moment, consider the mischief which would result from the doctrine contended for by the gentleman: suppose that a man in this city, who had given a bond and warrant of attorney to confess judgment, should by fraud obtain possession of the warrant, as is alleged in this case, and should be about disposing of the property intended to be secured—what is the creditor who held the security to do, unless he can have the benefit of his judgment? He cannot make application to the court (as was done in the case of Wadsworth against Caldwell) if it be not in session. He may, it is true, file a bill in chancery and obtain an injunction restraining the debtor from disposing of his property: but it is well known that it would require at least six days, after the bill was prepared, by the most speedy conveyance, to have the order for the injunction obtained in Albany, and served in this city. In the mean time the property is assigned, and put beyond the reach of the creditor. But the authorities inform us that the authority contained in the warrant of attorney is irrevocable; and yet, if the creditor could not summarily obtain his judgment, and by virtue of an execution seize the property, *the authority is practically revocable.*

I, therefore, insist, that the entry of this judgment was not contrary to law; and, taking it for granted that the representations of M'Dermut were true, unless he could have had the benefit of a judgment to secure this property, there would have been a manifest failure of justice.

The counsel addressed the jury: gen-

tlemen, if under the circumstances in which M'Dermut was placed previous to the entry of this judgment, he had applied to me for professional assistance, and have made the same representations that he did to my clients, I declare to you, in the sincerity of my heart, I do not know what other advice *I could have given*—what other measures could have been adopted to save the property.

About three weeks before the entry of this judgment, the supreme court had ordered, in the case of Wadsworth against Caldwell, that where the party had torn the warrant of attorney, a judgment should be entered up against him; and, on principle, there is little difference between that case and this.

On the very day the judgment was entered, preparation was made for a motion in the supreme court on behalf of M'Dermut, the bill in chancery was prepared; and those persons who, it is alleged, *conspired together* were the first to bring up the whole features of *this dark conspiracy* before the constituted authorities. Until the injunction was served, by which Arden found himself restrained in his fraudulent designs, he never dreamed of a conspiracy. Then, and not till then, he goes before the grand jury, and makes his complaint. Before this, as appears by the testimony of Mr. Dey, M'Dermut would not recede an inch; but, like most other plain unlettered men, frightened at the very *name* of a criminal prosecution, and acting without the aid of counsel, he was forced into a settlement with Arden upon his own terms, and my clients were abandoned to their own fate.

There are one or two facts only, in the testimony of Arden, to which I would call your attention. He states that he was willing to swear to the facts contained in the affidavit prepared by Mr. Garr: that, without looking at it, he carried it to M'Garaghan, and, without knowing its contents, handed it to that gentleman, saying, "Here is a paper I wish you to advise me not to sign!" Now this fact alone, gives a character to the whole testimony of Arden, which cannot be mistaken.

When Mr. Garr came to Arden and demanded payment of the notes due to

M'Dermut, and the delivery of the warrant of attorney, Arden evaded the demand—he “*was so much astonished* that he knew not what to say—he could not answer without the advice of counsel!” What advice did he want, to reply to a demand so plain, so specific? Had he been an honest and candid man, would he have been afraid of declaring the truth—would he have hesitated in saying, Sir, the warrant of attorney was given up to me by M'Dermut to be destroyed—these notes are not to be paid till the end of the year?

Van Wyck. This case, as has been well observed by the opposite counsel, is novel and extraordinary. It was indeed *a bold step* on the part of these attorneys to proceed in the manner they did—a step taken, which tended to the manifest perversion of justice. The falsity consisted in this, that at the time this judgment was entered up, there was no warrant of attorney; and the proceeding was illegal, inasmuch as it was contrary to the express provisions of the statute.

Attorneys have no right to set up themselves as legislators: they should be careful in their practice, and beware of doing that which they know to be contrary to law, for the purpose of subserving the interest of their clients. I much doubt, notwithstanding the earnest asseveration of the gentleman who last addressed you, whether he would have ventured upon the *bold measure* of entering up this judgment in vacation without a warrant of attorney—I do not believe that any other member of the profession would have hazarded the experiment.

In the case of Wadsworth vs. Caldwell, mentioned by the gentleman, he well knew that Mr. Jay, an experienced practitioner, who was the attorney and counsel for Wadsworth, did not venture to proceed, in entering up the judgment, before he had submitted the whole matter to the court in the application made by him.

But this transaction, on the part of the defendants, was commenced with an utter disregard to precedent, and consummated by artifice and deceit. What was the transaction in the recorder's office but a manifest deception? Instead of carrying the record and costs to the clerk, who is cautious and vigilant in such cases, and ne-

ver lets a paper pass without examination, they carry the papers to the office of the recorder, where, in office hours, they well knew, he was pressed with business, and, for that reason, might sign the judgment and tax the costs without examining the other papers. The plan succeeded: the recorder mistook *the release of errors* for the warrant, and the papers passed the office. The judgment is perfected—execution issued—the property of Arden seized—his business suspended; and to crown this enormous transaction, an affidavit is prepared for a motion in the supreme court, and a bill in chancery for the purpose of forcing him to their own terms! If such proceedings are to be tolerated, gentlemen, in this community, what awful consequences would ensue! If such combinations are not to be punished by the strong arm of public justice, let every man look well to his own safety! In this case, it is easy to see what might have been the consequence had Arden been absent.

The counsel proceeded to examine the bill in chancery, and contended that many of its allegations were untrue.

It is, said he, for this manifest perversion of justice—this high handed act of entering up this judgment, contrary to the statute, that we complain.

By the Court; gentlemen of the jury, this is an indictment against Robert M'Dermut, Andrew S. Garr, and George Caines, for conspiring together to enter up a judgment against Daniel D. Arden in the supreme court.

It is a principle applicable to civil cases that the court is to judge *of the law* and the jury *of the fact*; but, in criminal cases a greater latitude is given to the jury: they are judges of the law as well as of the fact.

I shall, therefore, in a brief manner, lay down to you the law applicable to this case.

To constitute a *conspiracy* it is essential that *two or more* persons should confederate together; and, in this case, whatever you may think of the conduct of M'Dermut, it is necessary for you to find that Garr and Caines combined with him, for the purposes alleged in the indictment, before you can find the defendants guilty of a conspiracy.

Had not the public prosecutor produced the injunction issuing from chancery in evidence, it would not have been competent for the defendants to have produced the bill, nor would its allegations have been evidence in their favour; and it appears to me, that the subject matter of that controversy is foreign to the inquiry in this case; but as the bill has been read, it is made evidence, and, in its material parts, contradicts the allegations of Arden. He testifies, that the warrant of attorney upon which this judgment was entered, was delivered to him by M'Dermut, *to be destroyed*. The bill alleges that when Arden obtained the warrant, he represented that *he wanted to show it to a friend*. Now it will rest with you to say, after an impartial examination of the testimony, on which of these two allegations, so directly opposed to each other, you can rely. And here it naturally occurs to the mind, if this warrant of attorney was delivered up by M'Dermut to Arden to be cancelled, and if the object for which it had been given was accomplished, why was this receipt given? Does not this render it a little improbable, that the warrant of attorney was delivered up for the purpose stated by Arden?

In my view, it will be safe for us to consider that the testimony on this branch of the subject is balanced: but I must again remind you that whatever may be your opinion of the conduct of M'Dermut, you never can convict, unless you believe that Caines and Garr conspired with him. There is no direct evidence of that fact before us, and I think you ought not to infer a conspiracy from the act of entering up this judgment, should you believe that M'Dermut made the representations to Caines and Garr, as stated in the affidavit, made to support the application in the supreme court, and in the bill in chancery. It is highly probable, from the relation which subsisted between M'Dermut and Garr, and from other facts in the case, that the former did make those representations; and it then became a question whether this judgment could be legally entered without a warrant of attorney.

On this question, I cannot entirely subscribe to the doctrine laid down by the counsel for the defendants. I doubt whe-

ther, in the supreme court, a judgment, on a bond and warrant of attorney to confess judgment, can be legally entered in vacation without producing the warrant of attorney to the judge or officer who signs the judgment, and filing that instrument with the record. It is true that the court has an equitable power in cases of this description; and where it appears that the warrant has been obtained by fraud and withheld, the court will grant relief; and this is the amount of the case which occurred in the supreme court in the term of January last. Still, when we see eminent counsel, as on this occasion, no doubt with sincerity, expressing a contrary opinion, we ought not to doubt that Caines and Garr, especially after the case just alluded to, and believing the warrant to have been fraudulently got up by Arden, acted from pure motives.

It will be for you to determine, under all the circumstances in this case, whether, in entering up this judgment, Caines and Garr, according to the charge alleged in this indictment, acted *wrongfully and maliciously*, with an intent of vexing and oppressing Arden. We have no reason to believe that they did not think they did right in protecting M'Dermut against a fraud about to be practised against him by Arden. Besides, we are unable to assign any motive which could have induced them to act corruptly: the costs of entering up the judgment was an inconsiderable sum; and I do not think that it can be gathered from the testimony of Arden but that they acted in good faith. Upon the whole, it does appear to me that you cannot say that Garr and Caines combined; and it is my opinion, that they ought to be acquitted without the least hesitation. And, whatever may be your opinion concerning the part taken by M'Dermut in this affair, and on this, I forbear to give any opinion, because I deem it unnecessary, you cannot, *in this case*, convict him without convicting the other defendants; and, from an impartial examination of the facts and circumstances in the case, I do not hesitate to say, that I believe it to be your duty to acquit the whole.

The jury, without leaving their seats, acquitted the defendants.

(MISDEMEANOR—NUISANCE—KEEPING HOGS.)

LOUIS LASHINE AND CHRISTIAN
HARRIOT'S CASES.

VAN WYCK, *Counsel for the several prosecutions.*

RODMAN and MAXWELL, *Counsel for Harriot.*

To keep and permit hogs to run at large in the heart of a populous city, is a misdemeanor at common law.

In such case, it is competent for the public prosecutor to prove particular acts, of a mischievous nature, committed by other hogs.

The defendants were severally indicted for a misdemeanor at common law, for keeping and permitting hogs to run at large in the city of New-York. In the case of Lashine, tried on the 11th of December last, it appeared that he kept a place at 191 Duane, near Hudson-street, as a receptacle for about forty hogs, many of which belonged to persons residing elsewhere in the city. There was no defence; and the jury, under the advice of the court, convicted him, and a nominal fine was imposed.

In the case of Harriot, which was tried on the 5th of January last, it appeared that he kept, in a pen, in Spring, near Mulberry-street, six or seven hogs, and permitted some of them to run at large.

After the introduction of this testimony, Van Wyck offered to show, by particular acts committed by hogs, in the streets of this city, that this species of animal was a nuisance.

Rodman objected to the evidence, and, after the arguments of counsel, the mayor decided that it was proper; as much so, said he, as in a prosecution against a man for keeping a manufactory for sulphuric acid in a populous city, it would be to introduce ehymists for the purpose of showing the deleterious nature of that substance.

It was then proved by several witnesses, that in various instances, hogs had seized and torn down children in the streets, and endangered their lives.

After the introduction of the testimony, Van Wyck, for the purpose of showing that the indictment was supportable, cited 4th Black. Com. p. 167. 2 Salk. 460. Burn's Dig. 259. 1 Hawk. P. C. 363. 3 Jacob. L. D. tit. Hogs, p. 297. 1 Johns. Rep. 90.

Rodman and Maxwell argued that, al-

though in this country the common law of England, in its general acceptation, had been adopted, yet the *local customs* of that were not obligatory in this country. That in England, the keeping of hogs, in a populous city, was a private nuisance, and referrible to *local customs* only. The counsel, with other authorities, read from a note in 1 Tucker's Blackstone, p. 62, to show, that the local customs of England could not have been translated from that country to this by our ancestors.

It was also insisted, that as the corporation had several years ago passed an ordinance prohibiting hogs from running at large, and had since repealed it, that body had virtually licensed the practice charged in the indictment.

The mayor charged the jury, that whatever the corporation may have done, or neglected to do, in relation to the subject under consideration, was immaterial, and should be laid entirely out of view. That body had no power to pass a law derogatory to the common law: for should they do so, the citizen would not be bound to obey.

This indictment is at common law, and is to be determined by its principles. A nuisance, for the purposes of this prosecution, may be denominated the doing an act which is a public annoyance: it is unnecessary that this act should affect life, or produce deleterious effects; it is sufficient if it have a tendency to deprive the citizen of the comforts and conveniences of life. To keep hogs and permit them to run at large in a populous city is a misdemeanor at common law.

The question for the jury to determine, is, whether the keeping of hogs, in the place and manner this defendant did, is a public nuisance. The *place* is to be taken into consideration: for it is apprehended, that what would be a public nuisance in one part of this city would not be so in another. For instance, to keep a sty with a number of hogs in Wall-street would, no doubt, be a nuisance; while to keep these animals confined, remote from the compact part of the city, would be no offence.

The jury found the defendant guilty, and he was fined in a nominal sum, and discharged on the payment of costs.